

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 01-30528

ACUSA.com, INC.

Debtor

MAURICE K. GUINN, TRUSTEE

Plaintiff

v.

Adv. Proc. No. 03-3018

HILL, HOLLIDAY, CONNORS,
COSMOPULOS, INC.

Defendant

**MEMORANDUM ON DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

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**RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE**

The Debtor filed the voluntary petition commencing its Chapter 7 bankruptcy case on February 5, 2001. On February 4, 2003, the Plaintiff, Maurice K. Guinn, Trustee, filed the Complaint initiating this adversary proceeding, seeking to avoid and recover a transfer in the amount of \$67,900.00 paid to the Defendant, Hill, Holliday, Connors, Cosmopolos, Inc., on April 3, 2000, pursuant to 11 U.S.C.A. §§ 548(a) and 550(a)(1) (West 1993 & Supp. 2003). The Defendant filed its Answer on March 21, 2003, denying that the transfer is avoidable. Presently before the court is the Motion for Summary Judgment filed by the Defendant on July 28, 2003. The Plaintiff filed his Response to Defendant's Motion for Summary Judgment on August 18, 2003.¹

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A), (H), (O) (West 1993).

I

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c) (applicable to adversary proceedings pursuant to FED. R. BANKR. P. 7056).

¹ On August 22, 2003, the Defendant, seeking to file an additional affidavit, filed a Motion to Supplement the Record, which was granted by Order entered August 26, 2003. The Plaintiff filed a Motion to Reconsider the Court's Order Permitting the Defendant to Supplement the Record on August 29, 2003, which the court granted by Order entered September 3, 2003, and whereby the Defendant's Supplemental Affidavit was stricken. The Defendant's Response to Motion to Reconsider the Court's Order Permitting the Defendant to Supplement the Record was filed on September 3, 2003, after the court's Order was entered, and it was not considered. Additionally, since the court has not considered the Defendant's supplemental documents, the court will likewise not consider the Plaintiff's Supplemental Response to Defendant's Motion for Summary Judgment filed on September 3, 2003.

When deciding a motion for summary judgment, the court does not weigh the evidence to determine the truth of the matter, but instead, simply determines whether a genuine issue for trial exists. *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986). The moving party bears the initial burden of proving that there is no genuine issue of material fact, thus entitling it to judgment as a matter of law. *Owens Corning v. Nat'l Union Fire Ins. Co.*, 257 F.3d 484, 491 (6th Cir. 2001). The burden then shifts to the nonmoving party to produce specific facts showing a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356 (1986) (citing FED. R. CIV. P. 56(e)). The nonmoving party must cite specific evidence and may not merely rely upon allegations contained in the pleadings. *Harris v. Gen. Motors Corp.*, 201 F.3d 800, 802 (6th Cir. 2000). The facts and all resulting inferences are viewed in a light most favorable to the nonmoving party, *Matsushita*, 106 S. Ct. at 1356, whereby the court will decide whether "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 106 S. Ct. at 2512.

II

In order to prove a *prime facie* case under § 548(a), the Plaintiff must establish the following four elements:

(1) a transfer of property of the debtor; (2) an exchange for less than reasonably equivalent value; (3) the debtor must have been insolvent on the date the transfer was made or rendered insolvent as a result of the transfer; and (4) the transfer occurred within one year preceding the petition date.

Bailey v. Metzger, Shadyac & Schwarz (In re Butcher), 72 B.R. 447, 449 (Bankr. E.D. Tenn. 1987); *see* 11 U.S.C.A. § 548(a)(1)(B)(i), (ii)(I) (West 1993 & Supp. 2003). In this case, as the other elements are not in dispute, the Defendant has moved for summary judgment on the basis that the Debtor received a reasonably equivalent value from the Defendant, in the form of plans for advertising services, in exchange for the \$67,900.00 payment received in April 2000.

"In assessing whether a challenged transfer is supported by reasonably equivalent value, courts generally compare the value of the property transferred with the value of that received in exchange for the transfer." *Corzin v. Fordu (In re Fordu)*, 201 F.3d 693, 707 (6th Cir. 1999). Clearly, "the contractual right to receive payment in the event that it turns out well is obviously worth something." *Allard v. Flamingo Hilton (In re Chomakos)*, 69 F.3d 769, 771 (6th Cir. 1995). Nevertheless, "valuation considerations are inherently fact-laden, turning on the case-specific circumstances surrounding the debtor's decision to enter into the challenged transaction." *Lowe v. B.R.B. Enters., Ltd. (In re Calvillo)*, 263 B.R. 214, 200 (W.D. Tex. 2000); *see also Anand v. Nat'l Republic Bank of Chicago*, 239 B.R. 511, 517 (N.D. Ill. 1999); *Ames Dep't Stores, Inc. v. Wertheim Schroder & Co., Inc. (In re Ames Dep't Stores, Inc.)*, 161 B.R. 87, 90 (Bankr. S.D.N.Y. 1993).

The following facts are not in dispute. The Debtor entered into a contract with the Defendant on March 1, 2000, whereby the Defendant agreed to provide advertising services to the Debtor. Under the terms of the contract, the Debtor agreed to pay a monthly "Agency Labor Fee" in the amount of \$67,900.00 to the Defendant. On April 3, 2000, the Defendant received the proceeds of the Debtor's check number 1308, payable to the Defendant in the amount of

\$67,900.00. Also under the terms of the contract, the Defendant began performing services for the Debtor. However, based upon the evidence submitted by both parties, the court agrees that there is a genuine issue of material fact as to whether the Debtor received a reasonably equivalent value in exchange for the \$67,900.00 paid to the Defendant, and therefore, summary judgment is not appropriate.

An order consistent with this Memorandum will be entered.

FILED: September 9, 2003

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

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ORDER

For the reasons stated in the Memorandum on Defendant's Motion for Summary Judgment filed this date, the court directs that the Motion for Summary Judgment filed by the Defendant on July 28, 2003, is DENIED.

SO ORDERED.

ENTER: September 9, 2003

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE